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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ELAINE CORY,

Plaintiff and Appellant,

v.

COLLEEN M. TOSCANO et al.,

Defendants and Respondents.

F062310

(Super. Ct. No. 07CEPR00246)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Hilary A. Chittick, Judge.

Curry and Curry and Thomas M. Curry for Plaintiff and Appellant.

Gilmore, Wood, Vinnard & Magness and David M. Gilmore for Defendant and Respondent Colleen Toscano.

Pape & Shewan and Jeffrey B. Pape for Defendant and Respondent Bruce Bickel.

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Appellant, Elaine Cory, and respondent, Colleen M. Toscano, are beneficiaries of the Louie Friguglietti Trust (Trust). Louie Friguglietti (Trustor) amended the Trust several times, including handwritten interlineations that reduced Cory's share of an asset from 100 percent to 25 percent. Following the Trustor's death, James Wagner, the trustee of the Trust, sent the notice required by Probate Code¹ section 16061.7 to Cory as a Trust beneficiary. Cory was also provided with a copy of the Trust that included the handwritten modification.

Cory filed a petition for construction of the Trust challenging the handwritten interlineations on the grounds that the amendment was invalid and that the Trustor was subjected to undue influence. The trial court ruled that Cory's petition was barred by the section 16061.8 statute of limitations. The trial court further found that the handwritten interlineations constituted a valid amendment to the Trust and that this amendment was not a product of undue influence.

Cory contends the amendment is patently void on its face and therefore its validity can be attacked at any time. Cory further argues that the statute of limitations is not a bar to her action. According to Cory, the statute of limitations should have been equitably tolled because the hand markings were not described in the notice as an amendment and Toscano should be equitably estopped from relying on the statute of limitations because she and Wagner concealed the evidence of undue influence. Finally, Cory asserts that the evidence does not support the trial court's finding that the hand markings were not procured by undue influence.

The trial court correctly denied Cory's petition. The petition is barred by the statute of limitations. Further, Toscano is not equitably estopped from asserting the statute of limitations. Accordingly, the judgment will be affirmed.

¹ All further statutory references are to the Probate Code.

BACKGROUND

The Trustor established the Trust on September 30, 2005, as a revocable living trust.

Article II of the Trust provides the Trust is to terminate and be distributed on the Trustor's death. With respect to Cory, the typewritten Trust provides “(a) To ELAINE CORY, the balance remaining from the sale of my real property in Los Banos, APN 081-110-007, consisting of approximately 28.5 acres on Overland Road” (*Cory v. Toscano* (2009) 174 Cal.App.4th 1039, 1042 (*Cory*).)

The Trustor executed two separate amendments to the Trust, one on October 7, 2005, and one on October 11, 2005. Neither of these amendments concerns the distribution to Cory. However, article II, paragraph (a), of the Trust was modified by handwritten interlineations. “There is a caret between ‘To ELAINE CORY’ and ‘the balance remaining from the sale’ Above the caret is ‘25% of’ and ‘10.11.05’” and written over the number “‘25’” are the initials “‘LF.’” (*Cory, supra*, 174 Cal.App.4th at pp. 1042-1043.)

The Trustor died on May 11, 2006.

On June 13, 2006, Wagner sent notice under section 16061.7 to the beneficiaries, including Cory. This section requires that a notice be sent when a revocable trust becomes irrevocable. As required, this notice included the warning that a beneficiary “‘may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served’” (§ 16061.7, subd. (h).) Wagner also provided Cory with a copy of the Trust that included the handwritten interlineations.

On June 30, 2006, Wagner sent a letter to Cory opining that Cory would receive “‘25% of Louie’s interest in the 28.5 acre parcel located on Overland Road’” under article II of the Trust.

On October 30, 2007, over a year after receiving the section 16061.7 notice, Cory filed an application under former section 21320² requesting the trial court to determine whether a proposed petition challenging the handwritten amendment would be a contest under the Trust's no contest clause. This court affirmed the trial court's finding that the proposed petition would not be a contest because the handwritten notations qualified as an instrument other than the instrument containing the no contest clause. (*Cory, supra*, 174 Cal.App.4th at p. 1046.)

Cory filed the underlying petition to construe the meaning of the Trust terms on October 5, 2009. Following a trial, the trial court ruled that Cory's petition was barred by the statute of limitations set forth in section 16061.8. The court concluded that Cory was required to file her petition no later than October 10, 2006. The court further found that: Cory failed to establish an equitable estoppel; the handwritten interlineations initialed and dated by the Trustor constituted a valid amendment to the Trust; and this amendment was not a product of undue influence.

DISCUSSION

1. Standard of review.

To determine whether the petition is barred by the statement of limitations, we must interpret the trust amendment. Since no relevant conflicting evidence was received, we are not bound by the trial court's ruling. Rather, our review is independent. (*Robinson v. Nevada Irrigation Dist.* (1980) 101 Cal.App.3d 760, 769-770.)

2. *The petition was untimely.*

Section 16061.8 provides that no person who has received notice under section 16061.7 "may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a

² Sections 21320 through 21322 were repealed effective January 1, 2010.

copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later.”

Cory was served with the section 16061.7 notice on June 13, 2006, and was provided with a copy of the Trust. Accordingly, Cory had until October 10, 2006, i.e., 120 days later, to file an action to contest the Trust.

Although Cory couched her petition filed October 5, 2009, as seeking an interpretation of the Trust, that was not the purpose behind the petition. (*Cory, supra*, 174 Cal.App.4th at p. 1044.) Rather, the petition sought to invalidate the handwritten modification to the Trust and reinstate the original Trust language. Cory asserted that the alleged amendment was not duly executed. Thus Cory’s petition constituted an action to contest the Trust. (§ 21310, subd. (b); *Estate of Stoker* (2011) 193 Cal.App.4th 236, 241.)

However, Cory did not initiate her contest until October 30, 2007, when she filed the former section 21320 application to obtain an advance ruling on whether her proposed petition would violate the Trust’s no contest clause. Thus, Cory’s action was filed over one year too late. Therefore Cory’s petition is barred by the statute of limitations. (§ 16061.8.)

Relying on *Estate of Caruch* (1956) 139 Cal.App.2d 178 (*Estate of Caruch*), Cory argues that the handwritten amendment was void on its face and therefore this amendment may be collaterally attacked at any time. According to Cory, the handwritten interlineations are void on their face because, having been later made, they are unsigned. In other words, Cory argues that the initials “L.F.” are not a valid signature.

In *Estate of Caruch*, the court noted that there is a very limited exception to the rule that, in the absence of a timely appeal, an order admitting a will to probate is conclusive. If the order admitting the will to probate is void on its face, it may be collaterally attacked at any time. (*Estate of Caruch, supra*, 139 Cal.App.2d at pp. 187-

188.) For example, if a will is unsigned and admitted to probate, it may later be collaterally attacked. “The reason for this rule is that the probate court, although having jurisdiction over the estate and the parties, has no jurisdiction to admit to probate a will that shows on its face that it does not comply with statutory requirements.” (*Id.* at p. 188.)

Here, the applicability of *Estate of Caruch* is questionable. This is a trust proceeding, not a probate. In any event, contrary to Cory’s position, the handwritten amendment is not void on its face. In executing a written document, no particular form of the signature is required for the signature to be valid. “The essential element is an intent to appropriate the name as a signature; it need not be the full handwritten name to qualify.” (*Poag v. Winston* (1987) 195 Cal.App.3d 1161, 1179.) For example, case law has held that the use of initials as a signature can be an effective signing of a will. (*Estate of Morris* (1969) 268 Cal.App.2d 638, 640.) Similarly, the name on a holographic will does not need to be a legal signature to validly authenticate the will. (*Estate of Williams* (2007) 155 Cal.App.4th 197, 211.) Further, the use of initials can be a valid signature for the creation of a trust. (*Weiner v. Mullaney* (1943) 59 Cal.App.2d 620, 633.) Accordingly, the Trustor’s use of his initials as his signature does not cause the amendment to be void on its face.

Cory further argues that the amendment is void because it was not delivered to the trustee by certified mail in accordance with the Trust’s requirements. However, this alleged defect does not appear on the face of the amendment. Thus, even if we were to apply the *Estate of Caruch* statute of limitations exception to a trust, we would not apply it here.

Cory also relies on *Estate of Neubauer* (1958) 49 Cal.2d 740 (*Estate of Neubauer*). In that case, the testator put a line through a gift and signed the change but did not date it. Thus, the change did not qualify as a holographic codicil. Further, the order admitting

the will to probate did not list this change as a codicil. The court held that, after the time to appeal the order for probate had elapsed, the question of what constituted the will could not be challenged. With respect to the beneficiary of the gift that had been lined out, the court noted that, from a practical point of view, there was no reason for that beneficiary to institute any kind of contest concerning the existence or validity of the bequest to it. (*Id.* at pp. 746-747.)

Cory attempts to apply *Estate of Neubauer* here. Cory asserts that, because Wagner's statutory notification only referred to the two separate written amendments and made no mention of the handwritten interlineations as an amendment, Cory had no reason to institute any kind of contest. In other words, the statute of limitations should have been equitably tolled, i.e., the running of the statute should have been suspended, because there was no reason for Cory to believe that those handwritten interlineations were any part of the Trust.

Cory's reliance is misplaced. Again, unlike here, *Estate of Neubauer* was a probate proceeding. Further, in this case there was no prior court order establishing what constituted the Trust. Moreover, a copy of the Trust with the handwritten interlineations was delivered to Cory putting her on notice of the changes and, shortly thereafter, Wagner sent Cory a letter explaining that she would receive 25 percent of the Trustor's interest in the subject parcel. Thus, Cory had reason before the statute of limitations expired to institute a contest challenging the handwritten amendment to the Trust.

In sum, Cory's petition was an action to contest the Trust and was commenced more than 120 days from the date Cory was notified that the Trust had become irrevocable because of the Trustor's death. Therefore, the petition is barred by the statute of limitations. (§ 16061.8.)

3. *Cory has not established an equitable estoppel.*

Cory asserts that, because Toscano and Wagner withheld facts from her on the circumstances surrounding the handwritten interlineations, Toscano is equitably estopped from asserting the statute of limitations. According to Cory, Wagner had a duty to disclose to Cory that Toscano was on the phone with the Trustor when the interlineations were made.

Equitable estoppel comes into play only after the limitations period has run. It addresses the circumstances in which a defendant will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because that defendant's conduct has induced another into forbearing suit within the applicable limitations period. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383.) However, the plaintiff's reliance must be reasonable and the plaintiff must proceed diligently once the truth is discovered. (*Id.* at p. 384.) Mere silence will not create an estoppel unless there is a duty to speak. (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268.)

Here, as found by the trial court, Cory has not demonstrated that Wagner's failure to inform her of the circumstances that existed when the handwritten interlineations were made induced her to delay filing the action to contest the Trust. Cory received a copy of the Trust with the modifications and testified that, at that time, she formed an opinion that the "L.F." initials did not look like the Trustor's handwriting. Shortly thereafter, Wagner informed Cory by letter that she would receive 25 percent of the disputed asset. Moreover, Cory sought out legal counsel well before the running of the statute of limitations.

Cory's original petition, proposed over a year after the statute of limitations expired, alleged only that the amendment was void due to its not being validly executed. Cory did not seek to amend the petition to allege undue influence until March 22, 2010.

Thus, Cory has not shown that Wagner or Toscano prevented her from timely filing her petition or that she reasonably relied on the alleged nondisclosure. Accordingly, Cory has failed to establish an equitable estoppel.

In light of our conclusion that Cory's petition was barred by the statute of limitations, we need not consider whether substantial evidence supports the trial court's findings on the merits of Cory's petition.

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

LEVY, Acting P.J.

WE CONCUR:

CORNELL, J.

GOMES, J.